IN MATTER OF ARBITRATION

-between-

THE NATIONAL ASSOCIATION of BROADCAST EMPLOYEES and TECHNICANS, LOCAL NO.57411

-and-

TWIN CITIES PUBLIC TELEVISION, Inc. ST. PAUL, MINNESOTA

OPINION & AWARD

Grievance Arbitration

F.M.C.S. Case 14/01370

Re: Employee Discipline

Before: Jay C. Fogelberg Neutral Arbitrator

Representation-

For the Union: Judi Chartier, Headquarters Counsel

For the Employer: Marko Mrkonich, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties, provides in Article VIII, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial steps of the grievance procedure. A formal complaint was submitted by the Local on behalf of the Grievant on or about December 8, 2013, and thereafter appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction. The under-signed was then selected as the

Neutral Arbitrator from a panel provided to the parties by the Federal Mediation & Conciliation Service, Office of Arbitration, and a hearing convened on June 26, 2014, Minneapolis, Minnesota. Following receipt of position statements, testimony and supportive documentation, each side indicated a preference for submitting written summary arguments. These documents were received by the Arbitrator on September 10, 2014, at which time the hearing was deemed officially closed. At the commencement of the proceedings, the parties stipulated that this matter was properly before the Arbitrator for resolution based upon its merits. While they were unable to agree upon a statement of the issue, the following is believed to fairly represent the nature of the dispute.

The Issue-

Did the Employer violate Section 10.7 of the Labor Agreement when they selected a less senior employee than the Grievant to serve as the Field Director for St. Thomas University's Holiday Program held at Orchestra Hall on December 8, 2013? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The record developed during the course of the proceedings indicates that the National Association of Broadcast Employees & Technicians, Local

57411 (hereafter "Union," "Association," or "Local") which is the broadcasting and cable television arm of the Communication Workers of America, AFL-CIO represents all full-time and regular part-time employees working in the Production Services Division of Twin Cities Public Television, Inc. ("Station," "Employer," or "Management"). The Employer owns and operates the KTCA and KTCI stations broadcasting in the Greater Twin Cities television market. Together the parties have negotiated a labor agreement covering terms and conditions of employment for members of the bargaining unit (Joint Ex. 1).

The Station utilizes part time personnel on a regular basis which is normally twenty hours per week. There are also employees who work less than twenty hours who are classified as "intermittent" part time personnel. Per the provisions in Article 10 of the Master Contract, *infra*, part time employees who have acquired at least 500 cumulative hours of work at the Station since 1999, are considered members of the "Senior Part Time hiring pool" and as such are offered work ahead of, "….any Part Time employee not in the pool" (Joint Ex. 1; p. 16).

The Grievant, Dean Coke, worked as a "part time intermittent employee" at KTCA in December of last year. He began his employment with the Company in the late 1990s, and since that time has worked as a Floor Director, Lighting Director, Grip, and in other capacities relating to program production for the Station. Someone working as a Floor Director is responsible for

managing the control room, keeping the production crews focused, handling the unexpected, and communicating with the director on a regular basis. Such an assignment applies to location productions as well as those performed in studio.

In December of 2013, the University of St. Thomas was scheduled to perform a holiday concert program at the recently remodeled Orchestra Hall in downtown Minneapolis, which was to be broadcast by KTCA. The Company had televised the program once before in 2010. However, this time it was to be the first event in the venue since it had undergone a massive remodel. Moreover, it had sat "dark" for a period of time after the project had been completed due to the lock out of the musicians by the Orchestra when the parties were at impasse over a new labor agreement.

The personnel necessary to produce the chorale concert required, among others, a Floor Director. In selecting someone from the bargaining unit for the assignment, the Production Manager, John Kendall, bypassed Mr. Coke, choosing a less senior part time employee for the job (Roger Larson) who was outside the Senior Part Time hiring pool. When the decision of Management came to the attention of Mr. Coke he notified the Union and they, in turn, filed a formal written grievance with the Station alleging a violation of Section 10.07 and all other relevant provisions of the Collective Bargaining Agreement (Joint Ex. 2).

Relevant Contract Provisions-

Article X
Seniority, Layoffs & Recall

* * *

Section 10.07. All Part Time Employees who have worked at least 500 cumulative hours since January 1, 1999 will be placed in a Senior Part Time hiring pool. At the beginning of each fiscal year, the employer will recalculate the cumulative hours of all Part Time Employees to determine the members of the pool for that year. NABET-CWA will be given the opportunity to approve the calculation before it is applied.

The Employer will call all qualified members of the Senior Part time pool before offering work to any Part Time employee not in the pool. In order to be booked, and Employee must, in the judgment of the employer, be qualified to perform the work available. In situations involving ongoing project assignments or other special circumstances determined by the employer, members of the Senior Part Time group may not be called for a specific assignment.

Positions of the Parties-

The **UNION** takes the position in this matter that the Employer violated Article 10, Section 7 of the parties' Labor Agreement when it appointed a less senior production employee to serve as the Floor Director at the December 8, 2013 Holiday Program at Orchestra Hall put on by the University of St. Thomas, over the Grievant who was a member of the Senior Part Time hiring pool. In support of their claim, the Local contends that the applicable language is mandatory, requiring that the Employer "*will* call all qualified members of the

Senior Part Time pool before offering work to any Part Time employee." Mr. Coke had been a relatively long-term employee who qualified for the Senior Part Time pool as he had accumulated over 500 hours of service, per the specified threshold set forth in Section 10.07. Further, they assert that he had experience as a Floor Director – both in studio and on location - and indeed had worked on the same program in 2010, when the St. Thomas Chorale group performed the same concert in the same venue. In December of 2013, he was available to serve as the Floor Director, yet Management selected another employee to perform the work who was not in the Senior pool. Additionally, the argument is made by the Union that Mr. Coke had worked on other production projects at Orchestra Hall and was familiar with what was required of the position. The Local adds that the Grievant knew the Production Manager, John Kendal, and had never had any problems working with him. For all these reasons then, they ask that the grievance be sustained and that Mr. Coke be made whole.

Conversely, the **EMPLOYER** takes the position that there was no violation of the Master Contract when in December of last year when they selected a less senior member of the bargaining unit to perform the work as the Floor Director for the St. Thomas Holiday program at Orchestra Hall. In support, Management contends that the Union has the burden of proof in this matter to demonstrate via the preponderant evidence that a contract violation

occurred, but has failed to meet that obligation. While the language in Section 10.07 establishes a process for selecting personnel for the Station's projects, which includes consideration of seniority, the Union has ignored a critical element in making their argument. That is, the same provision explicitly reserves with Management the right to judge whether the senior employee is "qualified to perform the work available," as contained in the second paragraph of the section. The December 8th concert was the first event to be held in the newly remodeled Orchestra Hall which had sat dark for an extended period of time due to the labor unrest surrounding the impasse between the Orchestra's union members and their employer. The Station had been made aware that a picket line might be in place at the time the St. Thomas program was to be aired, and that the event would be in the public's eye as a consequence. These factors heightened the Station's concern surrounding the production. When Mr. Kendal considered the candidates for the Floor Director's assignment, these matters influenced his decision, as the University of St. Thomas is a highly valued partner of the Station and the parties have enjoyed a lengthy favorable relationship. In the Production Manager's opinion, the Grievant was not the most qualified employee for the assignment. One of the primary functions of a Floor Director is to interact in a positive way with the production crew and the director. In Mr. Kendal's view, the Grievant lacked the personal skills for the particular assignment. On occasion in the past, he had demonstrated a lack of

tactfulness and professionalism in the performance of his duties as a Floor Director. The Employer adds that there was no economic incentive to select the less senior employee. In fact, it was more expensive as they were required to pay Mr. Larson overtime for the assignment given the number of hours he had already worked prior to becoming the Floor Director on the project. For all these reasons then, they ask that the grievance be denied in its entirety.

Analysis of the Evidence-

Distilled to its essence, this contract interpretation dispute centers on the wording of the second paragraph of Section 10.07 of the parties' labor agreement. The Union, who bears the initial burden of proof in this matter, contends that, simply put, the Employer violated this provision when it failed to offer the Floor Director assignment for the 2013 holiday concert to be held at Orchestra Hall, to Mr. Coke prior to assigning it to Mr. Larson who was not in the Senior Part Time Pool at the time.

The evidence placed into the record, clearly demonstrates that the Grievant was bypassed by Management who did not offer him the position but rather assigned it to another part time employee (Larson) who was not in the Senior Part Time pool. A reading of the first sentence of paragraph two in the section would appear to support the Local's assertion that the Company's actions indeed violated the terms of the contract.

Further, the uncontroverted evidence shows that the Grievant was "qualified to perform" the work of a Floor Director as he had worked in that capacity for the Station on numerous occasions prior to the events leading up the to filing of the grievance. At first glance then, it would appear that the Association has established a prima facie contract violation based upon the first two sentences of the second paragraph in Section 10.07. A closer examination of the balance of the paragraph however, produces a contrary result.

Initially, the relevant wording clearly reserves with the Employer the prerogative to determine the qualifications of the employee as the provision requires that in order for a member of the production staff to be selected for the position, he/she "….must, *in the judgment of the employer*, be qualified to perform the work available" (Joint Ex. 1; emphasis added). When this language is coupled with the next sentence in the section, the Union's argument begins to lose altitude.

Certainly, the Company's decision must withstand any assertion that their actions were arbitrary, discriminatory or otherwise made in bad faith. Here, while the Employer does not dispute that the Grievant had experience with the position in question, they nevertheless rely upon their authority to determine the qualifications to perform the assignment at Orchestra Hall in December of last year, in light of the "special circumstances" surrounding the holiday concert

that was to be staged there by the University of St. Thomas.

The final sentence in the paragraph is also clear on its face. No one disputes its intent. If it can be shown that the situation was unique enough to bypass the normal method of assignment as addressed in the opening sentence of the paragraph in question, and that Management did not act in an arbitrary or capricious manner in not selecting a member of the Senior Part Time grouping, then I am satisfied no contract infraction was committed.

The Union, while recognizing the qualifying language in the agreement allowing the Employer to bypass the seniority provision under certain "special" circumstance, nevertheless maintains that the Station failed to demonstrate that the labor dispute between the Minnesota Orchestra and its musicians qualified as an exception. I must however, respectfully disagree.

In the course of his testimony, the Station's Senior Vice President and Chief Content Officer, provided compelling evidence in support of the Company's position. First, under direct examination, the witness noted that the musicians' union had threatened to picket the event which would be the first since the facility had been remodeled and thereafter had remained "dark" for a significant period of time during the course of the ongoing strike, thereby increasing the attention given to the event both in the media and by the public

in general (Tr. p. 117-118).[1] He elaborated further how these conditions influenced Management's decision:

> Company: "How did that affect decisions as it related to staffing or what, if it did at all?
>
> O'Reilly: It affected our decisions related to staffing in much the same way if affected all of our decisions on this project. We knew that this was a very important, very visible project, more than many that we were doing at that time and that we wanted to be scrupulous in being sure that the decisions we made would allow us to produce the best possible show and minimize the possibility of having problems.
>
> Q: in terms of the special circumstances in play, did that call for a higher level than normal of diplomacy and tact in dealing with members of the public and the performers and the staff at Orchestra Hall and others?
>
> A: Absolutely" (Tr. p.118).

The Association charges the Employer failed to demonstrate that the labor dispute between the Orchestra and its musicians constituted a "special circumstance" having an impact on its decision not to assign Mr. Coke to the Field Director's position. However, under cross examination, the Station's Vice President, in my judgment, offered a sufficient explanation:

> Union: "Mr. O'Reilly, what did the labor dispute at Orchestra Hall have to do with the selection of Mr. Larson over Mr. Coke?
>
> O'Reilly: The only relationship that there was between those two was the that the ongoing labor situation at the Hall created a

[1] All references to the transcript of the arbitration hearing are noted as "Tr." followed by the page number.

> special separate circumstance there that required we be particularly diligent in our selection, of employees to be working on the job. As an example, the fact that there was so much public and press scrutiny of what was going on at Orchestra Hall meant that if we had a disturbance of some sort it would quite clearly get more visibility in the public than it might otherwise get. The specifics of the labor matters between the orchestra members and the orchestra association were really irrelevant.
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> * * *
>
> Q: Okay. I'm just trying to understand that why does the existence of a labor dispute at Orchestra Hall have an impact on the decision of Mr. Larson over Mr. Coke?
>
> A: I think the use of the characterization of a labor dispute may be what's causing the confusion here. The fact that there was a dispute of any sort going on at Orchestra Hall that had such high visibility in the public meant that whatever went on there in the course of our production was likely to get greater scrutiny and so we were scrupulous in being sure that we chose the best possible, most qualified people for [the] jobs" (Tr. p. 120-121).

The witness further observed that the Employer and the University of St. Thomas (one of the Station's most significant benefactors) had enjoyed a lengthy most favorable relationship; that the school's holiday concert has historically been performed before very large audiences, and; that it was being broadcast nationally. Indeed, under cross examination, Union Shop Steward, Jim Kron acknowledged that there was a "heightened level of concern" for Management in connection with the production at Orchestra Hall at the time, and that the continuation of a favorable relationship with the University of St. Thomas was "absolutely" important to the Company (Tr. p. 55-56).

These facts were not disputed on the record, and demonstrate the Employer's legitimate concern for preserving their positive association with the University of St. Thomas.

The question then remains whether the Company acted reasonably when it bypassed Mr. Coke for the assignment. Here, following a careful review of the relevant evidence, I find that an affirmative answer is appropriate.

The Employer claims that the Grievant's past performance at the Station in which he demonstrated that he lacked the necessary communication skills and tact required for such a critical role as Floor Director, justified their decision to bypass him in this instance. As support, they cited as an example, his work on the Suze Orman show in 2011 where he served in the same position. In that instance, the Director had commented that Mr. Coke was repeatedly appearing in camera shots which subsequently needed to be edited out (Tr. p. 100-101). While other employees involved in the same production were in the shots as well, as the Local has accurately noted, the evidence indicates that the Grievant appeared to be "completely disinterested and not participating in the show" (Tr. p. 108). More particularly he was observed leaning against a wall and looking unfocused and disinterested in the ongoing performance (*id.*). Additionally, through the testimony of the Station's Vice President for Production, David Wermus, it was demonstrated that Mr. Coke was also bypassed for the same position for the show "Almanac" due to his past

performance which lacked professionalism. Both Wermus and the Employer's Senior Manager for Production, Ted Hinck testified that the Grievant had a tendency to be unnecessarily confrontational and unpredictable at times (Tr. p. 64 & 82).[2] The evidence reveals that the approach taken by the Production Manager for the Orchestra Hall concert, John Kendall, was consistent with the opinions expressed by Messrs. Wermus and Hinck. Particularly, the latter testified that Mr. Kendal consulted him asking who he might call to staff the concert as a Floor Director, and that he advised against using the Grievant (Tr. p. 101).

The Union counters that much of Mr. Wermus' opinion was based upon what others had told him, rather than his own personal experience with the Grievant (Wermus testified that he had only met him once). While it is true that his recollections can arguably be considered hearsay, it was shown that Hinck had worked with Mr. Coke in the past and had personally observed him act inappropriately and become angry and argumentative with a performer in connection with a 2012 production (Tr. p. 110).

The Association further maintains that the Grievant had never been disciplined or counseled for work performance issues, nor had he received a poor job evaluation. While he may not have been formally disciplined under

[2] Mr. Wermus testified that he had been informed over a two year time span by half a dozen different people – production managers and managing producers working at the Station, none of whom had indicated any personal animosity towards the Grievant - that the Grievant had issues with tactfulness (Tr. p. 82-85).

the terms of the labor agreement, the evidence nevertheless demonstrates that he had received informal coaching on occasion from Mr. Hinck and was advised that it was inappropriate to speak to a performer in the manner in which he did. Moreover, the Grievant himself allowed that he had been "warned" regarding his sometimes abrasive communication style and that it was counter productive (Tr. p. 31).

Braided together, this evidence demonstrates to my satisfaction that Management's decision not to give the assignment of Floor Director for the St. Thomas concert was reasonable under the circumstances. The testimony and documentation placed into the record shows that it was not made in bad faith. To the contrary, the decision was based on personal experience and observations of the Grievant creating a concern with his tactfulness and communication skills previously demonstrated.[3]

Finally, I have taken into consideration the Union's assertion that notwithstanding Mr. Coke's experience, the Employer failed to offer the assignment to two other members of the Senior Part Time Pool, before appointing the junior employee. In support of their position, the Local points out that the wording of the grievance itself is couched in terms of "*members* of the Senior Part Time Pool" indicating that the complaint encompassed more than

[3] Indeed, the record reveals that it likely cost the Station more money to utilize the services of Mr. Larson for the production than it would have if the Grievant had been appointed as the former was eligible for overtime pay at that time (testimony of Union Steward Kron; Tr. p. 58).

Coke's alone. Further they maintain that no evidence was proffered to indicate that either bargaining unit members Paul Brown or Joe Price – both of whom were in the Senior Part Time Pool – were extended an offer to serve as Floor Director at the holiday concert at Orchestra Hall. This argument however, must be rejected in light of the recorded evidence.

Initially, it is noteworthy that throughout the hearing neither Brown nor Price were ever mentioned by name. Nor did either appear to testify. Indeed, in their opening remarks, the Local made it clear that the dispute involved a singular complaint of Mr. Coke. There were numerous references by the Association to Dean Coke as the lone grievant. For example, he was identified as "*Our grievant, Dean Coke*" who had been a member of the Senior Part Time Hiring Pool at Twin Cities Public Television for years (Tr. p. 9; emphasis added). The Union's complaint as laid out at the outset of the hearing repeatedly identified Mr. Coke as being the only one the Employer failed to offer the work in question (*id.*). In fact in summarizing their position and making reference to the remedy sought, the Association specifically asked for a finding that the Company violated Section 10.07, "….when it did not call *Dean Coke* to work on the St. Thomas musical program," and seeking an order that "….the Company pay *Mr. Coke* the amount it paid to Mr. Larson for that assignment" (Tr. p. 10; emphasis added). Significantly, no other bargaining unit member was identified as warranting any kind of relief.

Further, when testifying in connection with the "screen grab from the Employer's Xytech computer schedule" (Union's Ex. 2), Shop Steward Kron alleged that the Company violated 10.07 because they "did not call all of the available 500-hour part-timers" listed therein (Tr. p. 37). Again however, neither Brown nor Price were specifically identified. Moreover, under cross-examination Mr. Kron acknowledged that beyond Grievant Coke, he did not know if others on the list were or were not contacted (Tr. p. 59).

This evidence then, when considered in its totality, demonstrates that the Local's assertion has not been convincingly established on the record.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 2nd day of October, 2014.

_/s/_____
Jay C. Fogelberg, Neutral Arbitrator